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No. 88-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN A. BERSANI, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rules 36.1 and 42 of this Court, the Chamber of Commerce of the United States (the "Chamber") respectfully moves for leave to file the accompanying brief as *amicus curiae*. The Petition raises issues of great importance to members of the Chamber and the Chamber wishes to ensure that the Court is fully apprised of its views as set forth in the attached brief. Petitioners and respondent the U.S. Environmental Protection Agency ("EPA") have consented to the filing of this brief; respondents the Sierra Club, the Conservation Law Foundation, the Environmental Defense Fund, the National Audubon Society and the National Wildlife Federation have not.

INTEREST OF THE CHAMBER

The Chamber is the largest federation of business organizations and individuals in the United States. Its current membership exceeds 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. Approximately 92 percent of the Chamber's members are small and medium-sized businesses. The Chamber regularly advocates its members' views in court on issues of national concern to American business and this Court has previously granted the Chamber an opportunity to express its views on significant matters.[1] The Chamber participated in this case as *amicus* in the district and circuit courts below. For the reasons set forth below, the Chamber is particularly concerned that the decision by the United States Court of Appeals for the Second Circuit ("Second Circuit") effectively grants EPA unrestrained authority to impose a new rule regarding wetland regulation on a case-by-case basis. The spector of *ad hoc* changes in the regulatory scheme makes investment in development projects unreasonably risky and threatens to eliminate small and medium-sized businesses from the development market.

This case presents several precedent-setting issues of critical concern to the business community. For the first time, the Court has been asked to review the scope of EPA's authority to veto a determination by the U.S. Army Corps of Engineers ("Corps") that a permit for the discharge of dredged or fill material into the navigable waters of the United States should issue. Of particular concern to the Chamber is the appropriate division of statutory responsibility between EPA and the Corps. This issue has been the source of a long-fought battle between the two agencies that began when section 404 (which regulates the discharge of dredged or fill materials), was included in the Federal Water Pollution Control Act of 1972. 33 U.S.C. § 1251

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[1] *See, e.g., Tull v. United States*, 481 U.S. 412 (1987); *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, _____ U.S. _____, 108 S. Ct. 376, 381 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Natural Resources Defense Council v. EPA*, 801 F.2d 457 (D.C. Cir. 1986).

et seq.[2] That section assigns to each agency specific responsibilities in the implementation of its provisions. The EPA has, however, historically sought to limit and even usurp the Corp's statutory responsibilities and has so acted in its Final Determination now before this Court.

Many Chamber members who own or wish to develop property regulated under section 404 of the Clean Water Act have been victims of this ongoing dispute over the scope of each agency's statutory authority. While this interagency tug-of-war has taken many forms,[3] the scope of EPA's authority to review Corps permit decisions is most significant. If EPA's veto of the Corp's decision to issue this permit and the Second Circuit's approval of the agency's action is upheld, these Chamber members — and the business community at large — will be subjected to the same statutory and regulatory overreaching and duplicative agency review that has occurred in this case. The Chamber believes that EPA's intrusion into the Corp's decision-making responsibilities under the Clean Water Act is excessive, unwarranted and not authorized and wishes to present these views to this Court.

Also at issue in this case is the fundamental fairness of EPA's actions and the failure of the agency to provide petitioners with due process of law. Petitioners herein fully complied with the regulations developed under section 404 and relied upon existing definitions with respect to whether a "practicable alternative" exists which will have less adverse impact on the

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[2] The Federal Water Pollution Control Act of 1972 was amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566. The statute, as amended, is commonly referred to as the Clean Water Act. To avoid confusion, the statute will be referred to as the Clean Water Act throughout this motion and the attached brief. The Clean Water Act was further amended by the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7.

[3] *See generally* Liebesman, The Role of EPA's Guidelines in the Clean Water Act § 404 Permit Program — Judicial Interpretation and Administration Application, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10272 (July 1984) (describing interagency disputes over the Corps' jurisdiction over wetlands adjacent to navigable waters and the binding effect of the Guidelines on the Corps).

environment under the applicable section 404(b)(1) Guidelines. *See* 40 C.F.R. § 230.10 *et seq.* In contrast, EPA, in its Final Determination in this case, abruptly and significantly changed the rule relating to the appropriate time frame to be used in the "practicable alternative" analysis. As a result, EPA subjected petitioners to a fundamentally unfair procedure in violation of due process.

It is of vital importance that EPA apply its regulations consistently and in a manner which does not offend the due process rights of petitioners herein and Chamber members which own or wish to develop property regulated under section 404. Unless EPA's action and its interpretation of the applicable regulations are reversed, small and medium-sized businesses, unable to risk capital on unpredictable and unlimited EPA discretion, would be driven from the development industry. Competition would needlessly suffer because the balancing test between economic and environmental concerns, which Congress created as the framework of section 404, would be destroyed.

For the foregoing reasons and as the principal voice of the American business community, the Chamber respectfully requests leave to file the accompanying brief and present to this Court sound legal and public policy reasons why the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Date: December 30, 1988

QUESTIONS PRESENTED

1. Whether the U.S. Environmental Protection Agency ("EPA") exceeded the scope of its delegated authority under section 404(c) of the Clean Water Act, 33 U.S.C. § 1344(c) (the "Act"), Petitioners' Appendix ("App.") E 111-12a, and usurped authority expressly vested in the United States Army Corps of Engineers ("Corps") by section 404(b)(1) of the Act when EPA prohibited the issuance of a section 404 permit to petitioners based on EPA's analysis of the practicable alternatives available to petitioners rather than limiting its review to the environmental criteria set forth in section 404(c).

2. Whether EPA violated its own regulations and the Administrative Procedure Act ("APA") and thereby subjected petitioners to a fundamentally unfair process in violation of petitioners' due process rights, when EPA adopted a new, substantive rule (the market entry test) and applied this rule for the first time, in connection with the EPA "Final Determination of the Assistant Administrator for External Affairs Concerning the Sweedens Swamp Site in Attleboro, Massachusetts Pursuant to Section 404(c) of the Clean Water Act" (May 13, 1986) ("Final Determination"), App. C 64a.

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BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The opinions below, jurisdiction of this Court, the statutory framework and the facts of this case are set forth in detail in petitioners' Petition. Those presentations are incorporated herein by reference.

INTEREST OF AMICUS CURIAE

The interests of the Chamber of Commerce of the United States (the "Chamber") in this matter are set forth in the accompanying Motion for Leave to File Brief as Amicus Curiae.

SUMMARY OF ARGUMENT

Section 404 of the Clean Water Act, 33 U.S.C. § 1344, App. E 111-12a, which regulates the discharge of dredged or fill material into the waters of the United States, sets forth discrete roles for EPA and the Corps in the 404 permit process. In this case, EPA exceeded the scope of its statutory authority and usurped the Corps' authority by unlawfully conducting its own *de novo* review, duplicating the Corps' review of petitioners' compliance with the applicable regulations. Not only did EPA exceed its authority by conducting this *de novo* review, but in that unlawful process EPA also adopted and applied to petitioners a *post hoc* rule — the "market entry" test — in utter disregard of its own regulations and the APA. In so doing, EPA subjected petitioners to a fundamentally unfair process and violated petitioners' due process rights. Moreover, EPA's *post hoc* market entry test is commercially unworkable and threatens the ability of small and medium-sized companies to compete in the development industry. For these reasons, the Petition for a Writ of Certiorari should be granted.

ARGUMENT

I. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE EPA EXCEEDED ITS STATUTORY AUTHORITY BY ENGAGING IN A *DE NOVO* REVIEW OF COMPLIANCE WITH THE 404(b)(1) GUIDELINES

In its Final Determination in this matter, EPA concluded that a permit should not issue to petitioners for the discharge of fill material at Sweedens Swamp because the discharge would result in unacceptable *adverse* effects on wildlife. *See* section 404(c), 33 U.S.C. § 1344(c), App. E 111-12a; Final Determination at 12 ("F.D. at ___"), App. C 82a. Because the applicable standard in section 404(c) requires a finding not

merely of adverse effects, but of "unacceptable" adverse effects, EPA declared:

> In determining whether these adverse impacts are unacceptable, it is relevant to examine next the avoidability of this wetland loss by reviewing whether there are *practicable,* less environmentally damaging *alternatives* to the proposed project.

F.D. at 13, App. C 83a.

In conducting its own practicable alternatives analysis, EPA concluded, contrary to the Corps, that a practicable alternative had been available to petitioners before July 1983. EPA's conclusion is based on its guess at "market custom" (and not based on anything in the record) that petitioners must have "entered the market" before July 1983, when the alternative site became unavailable to petitioners. F.D. at 22-23, App. C 95-96a. EPA concluded that because an alternative had been available to petitioners, the adverse effects on wildlife were avoidable and, therefore, unacceptable within the meaning of section 404(c). F.D. at 31, App. C 107-08a.

The district court upheld EPA's Final Determination, *Bersani v. EPA,* 674 F. Supp. 405 (N.D.N.Y. 1987), App. B 31a, deferring to EPA's interpretation of the regulation, and holding that its "carefully circumscribed" function was to "uphold a reasonable [EPA] interpretation, even if the court would not have reached the same conclusion in the first instance." 674 F. Supp. at 412, App. B 45a. The United States Court of Appeals for the Second Circuit ("Second Circuit"), with the Chief Judge dissenting, affirmed the district court, holding that the "market entry" theory was a reasonable interpretation of the regulations. *Bersani v. Robichaud,* 850 F.2d 36, 45 (2d Cir. 1988), App. A 22a.

EPA's Final Determination and the lower courts' decisions upholding EPA's action are inconsistent with the express language of the statute which establishes discrete and separate roles for the two executive agencies charged with the responsibility to administer the section 404 program.[1] As such, they reject the section 404 permitting scheme designed by Congress.[2] Their analyses also shift the burden of proof under

[1] Section 404 of the Clean Water Act establishes a logical permit process under which the two executive agencies involved in the administration of the program are assigned discrete and non-duplicative roles. 33 U.S.C. § 1344, App. E 111a. The Corps — the permitting agency — is required upon application to conduct a broad-based review applying the standards in the 404(b)(1) Guidelines and those in the "public interest review."

If the Corps determines, based on its first level review, that a permit should not issue, it must, in appropriate cases, conduct a more narrow and focused review to determine whether the economic impact on navigation and anchorage of not issuing a permit for the particular project outweighs the harmful effects identified under its overall review which normally would justify a denial. If the Corps determines that the economic impact is substantial, it may override the denial of a permit. 33 U.S.C. § 1344(b)(2), App. E 111a.

Finally, EPA is authorized under section 404(c) to veto a permit even if the project is in compliance with the 404(b)(1) Guidelines and is in the public interest. To invoke this authority, however, EPA must first determine that certain statutorily identified critical resources exist at the proposed site and the adverse effect on one or more of these resources from the proposed activity is unacceptable. EPA's burden here is narrow and focused; it implicates only the particular resource and the particular site in question. Only a finding that the loss from the proposed activity would be unacceptable (major, important, or consequential and one the environment cannot do without) justifies a permit veto. 33 U.S.C. § 1344(c), App. E 111-12a; 44 Fed. Reg. 58076, 58078 (1979).

In fact, EPA has expressly recognized that the statute vests the Corps with exclusive authority to apply the section 404(b)(1) Guidelines. *See* Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. 186 (1985) ("The [404(b)(1)] Guidelines, developed by EPA in conjunction with the Corps, contain the substantive environmental criteria which must be met in order for a permit to be issued. EPA advises the Corps on whether or not discharges comply with the Guidelines; however, with respect to its own permit actions *the ultimate decision on compliance belongs to the Corps*") (statement of Richard E. Sanderson, Acting Asst. Admin. for External Affairs, U.S. Environmental Protection Agency) (emphasis added)).

404(c) from EPA to the permit applicant. In effect, under EPA's and the courts' analyses, the applicant must disprove that the adverse effects are unacceptable rather than EPA demonstrating that they are. If left in effect, these decisions open the floodgates for a tremendous bureaucracy destined to burden the permit process and delay projects into extinction.[3] This Court should grant the Petition for Certiorari in order to correct this administrative overreaching and reinstate the clear intent of Congress.

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[2] The legislative history supports the proposition that the 404(b)(1) Guidelines are to be applied solely by the Corps. In granting veto power to EPA under section 404(c), Congress noted:

> The decision is *not duplicative* or cumbersome because the permit application transmitted [by the Corps] to [EPA] for review will set forth the . . . *site* to be used. . . . The Conferees expect [EPA] to be expeditious in [its] determination as to whether a *site* is acceptable. . . .

1972 Legis. Hist., Vol. 1 at 177 (emphasis added). Thus, Congress clearly specified that EPA's review was to be a site-specific analysis in which alternative locations (already considered by the Corps) were not a factor.

[3] The legislative history of the Act demonstrates Congressional intent to avoid unnecessary regulation and red tape, 1977 Legis. Hist., Vol. 4 at 708, and to avoid creating "a burdensome bureaucracy in light of the fact that a system [operated by the Corps] to issue permits already existed," 1972 Legis. Hist., Vol. 1 at 177. As Sen. Bartlett noted during debate on the 1977 amendments to the Clean Water Act:

> Delays can be ill-afforded . . . . Business decisions are made on the basis of a number of tangible and intangible considerations . . . . Lengthy delays detrimentally affect the business planning which has become increasingly imperative in complex business . . . .

1977 Legis. Hist., Vol. 4 at 942. *Accord Sierra Club v. Sigler,* 695 F.2d 957, 981 (5th Cir. 1983) (protracted proceedings in environmental cases "can kill projects by delay").

Petitioners originally applied for their permit in September 1984. After careful review and after considering the advice of EPA, the Corps approved the permit in June 1985. EPA then initiated a 404(c) review, but rather than confining its review to the criteria set forth in 404(c), it duplicated the Corps' practicable alternatives analysis and, based on the exact same regulation and set of facts, reached a contrary conclusion nearly one year later, F.D. at 2, App. C 66a. Such administrative delay is precisely the type of bureaucratic duplication and deterrence which Congress sought to avoid. 1977 Legis. Hist., Vol. 4 at 942.

II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE EPA VIOLATED DUE PROCESS IN ANNOUNCING THE MARKET ENTRY TEST AND THIS COURT SHOULD NOT CONDONE SUCH AGENCY ACTION

In this case, EPA conducted the *de novo* "practicable alternatives" analysis unlawfully in that it adopted a new standard and rule regarding the availability of alternatives. EPA drastically and unlawfully changed the applicable standard for determining when a "practicable alternative" exists under the 404(b)(1) Guidelines, from one of present availability to one of historic or "market entry" availability. F.D. at 21 n.14-15, 22, App. C 93-95a.

The adoption and application of the new rule violated EPA's own regulations and the APA.[4] This conduct is contrary to law and resulted in a denial of petitioners' due process.[5] EPA's action was therefore void and unenforceable.[6]

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[4] The 404(b)(1) Guidelines provide:

> No modifications to the basic *application, meaning,* or *intent* of these Guidelines will be made without rulemaking by the Administrator under the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*).

40 C.F.R. § 230.2(c) (emphasis added).

[5] Failure of an agency to follow its own regulations constitutes a violation of due process. *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954).

Further, The APA was "designed to provide guarantees of due process in administrative procedures." Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 298 (1946). *See Morton v. Ruiz,* 415 U.S. 199, 232 (1974); *Hill v. Federal Power Comm'n,* 335 F.2d 355 (5th Cir. 1964) (hearing unfair where standards applied had not evolved or been announced until agency decision held them unsatisfied).

[6] It is settled law that an agency's failure to follow its own regulation is unlawful and unenforceable. *Vitarelli v. Seaton,* 359 U.S. 535, 539 (1959); *Service v. Dulles,* 354 U.S. 363, 379-80 (1957).

Similarly, it is well-established that substantive or legislative rules adopted without the notice and comment procedures of the APA are void and unenforceable. *Shell Oil Co. v. Federal Energy Admin.,* 574 F.2d 512, 516

(Continued on page 7)

Had EPA applied the lawful standards to petitioners' project, EPA would have found, as the Corps did and as the record below demonstrates, that there were no practicable alternatives to petitioners' proposed project and, accordingly, no basis for vetoing petitioners' permit on the ground that the project was "avoidable." *See* "Views of the Chiefs of Engineers [Corps]," at p. 6 (May 31, 1985).

The 404(b)(1) Guidelines[7] provide that a permit will not be issued "if there *is* a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem . . . ." 40 C.F.R. § 230.10(a), App. F 113-14a (emphasis added). The test clearly is written in and applies only to the present tense. It is self evident that "is available" does not mean "*ever was* available" as the market entry test requires.[8]

The regulation requires the applicant to demonstrate in his permit application that there are no practicable alternatives to his proposed project. The regulation does not require an applicant to be aware of all alternatives at the moment the applicant entered the market (whenever that was) and to purchase immediately such properties. Applying this arbitrary market entry standard to petitioners is unlawful not only

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(Continued from page 6)

(Temp. Emer. Ct. App. 1978) ("A plethora of cases hold that an administrative rule which is not promulgated in accordance with [rulemaking] procedures is void") (citing *New York v. Diamond*, 379 F. Supp. 503, 516 (S.D.N.Y. 1974)).

The United States District Court for the Eastern District of Virginia, in *Tabb Lakes, Ltd. v. United States*, Civil Action No. 87-635-N (E.D. Va. Nov. 7, 1988), recently set aside Corps action in a section 404 permit proceeding because the Corps failed to comply with the rulemaking requirements of the APA.

[7] These Guidelines were promulgated in 1980, 45 Fed. Reg. 85344 (1980), and have remained unchanged since that time. Moreover, neither EPA nor the Corps in thousands of permit decisions since that time has ever applied a market entry test for determining whether a practicable alternative existed.

[8] This Court, in *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, _____ U.S. _____, 108 S. Ct. 376, 381 (1987), recently held that plainly present-tense language should not be converted to the past tense.

because it is extraordinarily vague, but because it did not even exist when petitioners applied for a permit.[9]

The courts which have reviewed the availability of practicable alternatives have uniformly considered current availability only and have not looked to the past availability of alternatives.[10] Further, EPA in prior 404(c) decisions, never as much as suggested, much less held, that alternatives which are not presently available may be deemed "practicable alternatives," based upon purported availability at some undefined time when the applicant was claimed to have entered the market.

The Court should grant the Petition for Certiorari in order to correct the excessive agency action in this case. EPA

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[9] In addition, EPA has announced this very complex, administratively difficult market entry concept without benefit of public participation, as contemplated by the Guidelines and the APA. The rulemaking procedures under the APA were designed in part to "communicate information, concerns, and criticisms to the agency . . . ." *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982). In this manner, the agency, through the APA procedures, would have an opportunity to educate itself before establishing rules which have a substantial impact on those regulated. *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478 (2d Cir. 1972). The "market entry" standard has not withstood the test of critical public scrutiny. As a result, EPA has not fully contemplated or analyzed the extreme practical difficulties of compliance with the administration of its new standard. In order to supply the agency with this vital information, APA rulemaking is absolutely necessary.

[10] *See Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986); *Louisiana Wildlife Federation, Inc. v. York*, 603 F. Supp. 518 (W.D. La. 1984), *aff'd in part, vacated on other grounds and remanded*, 761 F.2d 1044 (5th Cir. 1985); *Nat'l Audubon Society v. Hartz Mountain Dev. Corp.*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10724 (D.N.J. Oct. 24, 1983); *Hough v. Marsh*, 557 F. Supp. 74 (D. Mass. 1982). *See also* "Final Determination of the Administrator Concerning M.A. Norden Site Pursuant to Section 404(c) of the Clean Water Act" (June 15, 1984) at 10-11; "Final Determination of the Assistant Administrator for External Affairs Concerning the Jack Maybank Site on Jehossee Island, South Carolina Pursuant to Section 404(c) of the Clean Water Act" (April 5, 1985) at 11-12 (EPA considered only one alternative which was currently available to, and in fact owned by, the applicant).

publishes regulations and interpretative determinations on a daily basis which significantly affect the rights and obligations of individuals. Unless the Court reverses EPA's decision, this matter will have a long term, chilling effect on the development industry and will most severely affect small and medium-sized companies, unable to risk capital on uncertain agency behavior.

III. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE MARKET ENTRY TEST IS COMMERCIALLY UNWORKABLE

For a number of reasons, the "market entry" test is impractical and commercially unworkable. In fact, the test is so extraordinarily vague and amorphous as to supply no standard whatsoever. When does "market entry" occur? At the time the applicant first reviews census data for market potential; when the applicant first investigates the area to determine its suitability for its project; when the applicant's first employee visits the area; or at some other time? It will be impossible for an applicant to define when "market entry" has occurred. Thus, the standard injects a high degree of uncertainty into the section 404 permit process. Moreover, an applicant cannot possibly know all alternatives available at the time of "market entry."

This new vagueness exacerbates the already difficult problem of determining whether a particular tract of property is a "wetland" as contemplated by the Act. *See, e.g., United States v. Riverside Bayview Homes,* 474 U.S. 121 (1985). Frequently a property's status as a protected wetland is not clear and can be ascertained only through careful and expensive analysis. Thus, it is not always readily apparent whether a property owner must apply for a permit before altering his property, much less whether he must have considered all non-wetland alternatives prior to purchasing it, regardless if that was six months or six years or sixty years ago. For small and medium-sized companies, such a high degree of uncertainty is fatal to those companies' ability to compete in the development industry.

CONCLUSION

EPA's action and the Second Circuit's affirmance of that action are contrary to section 404 of the Act and in violation of due process. These actions create significant uncertainty and confusion for all companies, particularly small and medium-sized companies interested in developing their land. Accordingly, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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